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Issue Date: 23 June 2003

CASE NO.: 1999-LHC-02451

OWCP NO.: 14-121959

In the Matter of:

WADE R. FISH,
Claimant,

vs.

GUNDERSON MARINE, INC.,
Employer,

and

LIBERTY NORTHWEST INSURANCE CORP.,
Carrier.

DECISION AND ORDER ON REMAND

INTRODUCTION

This case involves a claim for disability benefits filed by the Claimant, Wade Fish, under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901 et seq. ("the Act") for an injury the Claimant suffered on March 28, 1996. This matter was initially heard by Judge Alfred Lindeman in Portland, Oregon, on March 15, 2000. Judge Lindeman issued a Decision and Order Awarding Benefits on July 6, 2000, which he modified on August 9, 2000, after the Claimant filed a Motion for Reconsideration. He subsequently also issued a Supplemental Decision and Order Awarding Attorney Fees on September 19, 2000.

Both parties filed appeals with the Benefits Review Board ("BRB") which issued a Decision and Order on August 30, 2001, vacating and remanding parts of Judge Lindeman's decision. Both parties sought reconsideration of the BRB's August 30, 2001, Decision, and on May 29, 2002, the BRB issued an Order on Motion for Reconsideration modifying its earlier Decision and Order. This case was assigned to me after it was remanded by the BRB because Judge Lindeman has retired and is no longer with the Office of Administrative Law Judges. On January 10, 2003, I issued a Notice of Assignment and Order re: Future Proceedings ordering the parties to advise me as to whether they felt there was a need for a further hearing in this matter. The parties responded that they felt there

was no need for a further evidentiary hearing and suggested a briefing schedule. They subsequently submitted briefs addressing the issues identified by the BRB in its remand order. The last memorandum was received on March 31, 2003.

For the reasons set forth below, the Claimant is awarded an additional \$2,073.12 in temporary partial disability benefits and the earlier award of \$1 per week compensation for the Claimant's permanent disability partial benefits is affirmed.

ANALYSIS AND FINDINGS

Issues To Be Resolved

Pursuant to the BRB's remand decision and order, the issues to be resolved are as follows:

1. What was the Claimant's post-injury wage earning capacity while he was temporarily partially disabled?
2. Does the Claimant have a current loss in his wage earning capacity due to loss of overtime?

The parties have additionally added as an issue -

3. What interest rate should be used for the additional benefits that are owed to the Claimant?

Background of Claim and Earlier ALJ Decisions

The Claimant injured his lower back on March 28, 1996, while working as a "leadman" for the employer. After being injured, he sought treatment from a number of different doctors who placed him on intermittent periods of light duty. On two separate occasions, a doctor found him to be medically stationary with no permanent impairment and returned the Claimant to regular work. On each occasion, the Claimant suffered a recurrence of back pain after returning to unrestricted work. On August 4, 1999, the Claimant underwent a lumbar laminotomy and discectomy to relieve his back pain.¹ On September 27, 1999, the Claimant was again released to full duty with no restrictions. In November 1999, the Claimant was promoted to foreman. The Claimant filed a claim seeking partial disability benefits under the Act.

The parties stipulated during the earlier proceedings that after his injury, the Claimant worked for the Employer in a light duty capacity during the following 15 periods of time:

¹ The Claimant's medical history is described in detail in Judge Lindeman's July 6, 2000, Decision and Order Awarding Benefits. References to "Initial Decision" will be references to Judge Lindeman's July 6, 2000, decision.

- 1 April 9 through May 22, 1996
- 2 June 12 through August 2, 1996
- 3 September 5, 1997 through January 25, 1998
- 4 January 28 through February 3, 1998
- 5 February 6 through February 16, 1998
- 6 February 19 through March 15, 1998
- 7 March 18 through April 16, 1998
- 8 April 19 through 27, 1998
- 9 April 30 through June 3, 1998
- 10 June 6 through 15, 1998
- 11 June 17, 18, 20, and 21, 1998
- 12 June 23 through September 23, 1998
- 13 September 26 through October 7, 1998
- 14 October 27 through November 2, 1998
- 15 May 25 through August 3, 1999

(Initial Decision at 2.)

Judge Lindeman found the Claimant reached maximum medical improvement on January 4, 2000, and that he was also temporarily partially disabled for the period from his return to full work duty on September 28, 1999, to January 4, 2000. (Initial Decision at 8.)

Judge Lindeman ruled that the Claimant was entitled to temporary partial disability benefits for each of the 16 periods when he was temporarily partially disabled. (Initial Decision at 8.) However, he also ruled that when the Claimant's post-injury wage earning capacity was calculated to determine the amount of the Claimant's benefits, the cost-of-living increases that the Claimant received after his injury did not have to be factored out. (Initial Decision at 9.)

Judge Lindeman also found that the Claimant had no current loss in his wage-earning capacity, but that he had a "significant possibility" of future loss. Judge Lindeman awarded the Claimant a nominal award of \$1 per week in permanent partial disability benefits to preserve the Claimant's ability to apply for a Section 22 modification in the event of a future change in condition. (Initial Decision at 10.) Judge Lindeman later awarded a total of \$9,100 in attorney fees to the Claimant's counsel. Both parties appealed Judge Lindeman's decision to the BRB.

BRB Determination

The BRB ruled that Judge Lindeman erred in deciding not to factor out the cost-of-living increases when the Claimant's post-injury wage-earning capacity was computed. It held that to accurately determine if there was a loss in the Claimant's post-injury wage earning capacity, any cost-of-living increases he received after the injury had to be factored out of his post-injury earnings before being compared to his average weekly wage. The BRB stated that by re-computing the Claimant's post-injury earnings using the wage rates in effect at the time of his injury, we would eliminate the

effects of inflation and put the Claimant's post-injury wage earning capacity on an equal footing with his average weekly wage. (BRB Decision and Order at 4.) Thus, to determine the extent of the Claimant's temporary partial disability, his post-injury earnings have to be adjusted to eliminate any earnings increases attributable to cost-of-living increases.

Wage Rate Used to Determine the Adjusted Post-Injury Wage Earning Capacity

The BRB ordered that the "wage rates in effect for the post-injury job at the time of the injury" be used in order to factor out the effects of inflation. (BRB Decision and Order at 4.) The parties, however, disagree about the correct pre-injury wage rate to use for the determination. It is undisputed that the Claimant was earning a base rate of \$16.40 per hour at the time of his injury, though his actual rate varied because of shift differentials and overtime. The Claimant argues that his base rate of \$16.40 should be used to determine how much his post-injury earnings increased due to the cost-of-living increases.

The Employer, recognizing the variations in the actually hourly rate paid, argues that the Claimant's actual pre-injury average hourly rate should be computed and used to determine what his adjusted post-injury earnings would be. It computed the actual hourly rate by simply dividing \$18,935.46, the Claimant's gross earnings between October 16, 1995, the date of the Claimant's last pay increase, and March 31, 1996, by 1,106, the number of hours paid during that period. (Gunderson Marine, Inc.'s, Memorandum Re: Issues on Remand at 7.) The Employer argues that this computed hourly rate of \$17.12 more accurately reflects the Claimant's hourly rate of pay before his injury because it takes into account all of the Claimant's wages during that time period, including higher hourly rates paid to him due to shift differentials and overtime work.

The Employer's computed \$17.12 per hour rate does accurately show the Claimant's actual average pre-injury hourly pay rate. However, it would not lead to an accurate figure for what the Claimant's post-injury earnings would be after the cost of living increases were taken out. The \$17.12 is an hourly rate which includes a significant amount of overtime pay. The Employer computed the hourly rate using the payroll records for the pay periods from October 16, 1995, through March 31, 1996. The Claimant's earnings during that time included 89.7 of overtime pay, an average of 3.73 hours of overtime each week. (Employer's Exhibit 12, pp. 16-19.)

The Employer had a policy of prohibiting voluntary overtime for employees on light duty. This policy precluded the Claimant from working voluntary overtime while he was on light duty. The payroll records show that the Claimant worked some overtime while on light duty². However, he worked significantly less overtime while on light duty. Between October 19, 1997, and December 5, 1999, while on light duty, he worked 101.2 hours of overtime, averaging 1.28 hours of overtime each week, one-third of the overtime he worked before his injury. (Employer's Exhibit 13, pp. 32-

² Presumably, this was mandatory overtime since he was ineligible for voluntary overtime. TR at 49.

45.) Thus, re-computing his post-injury earnings using the Employer's hourly pay rate that includes an average of 3.73 hours of overtime would artificially inflate the Claimant's adjusted earnings.

The Claimant argued that his straight hourly rate of \$16.40 at the time of his injury should be used as the base pay rate to determine how much his post-injury earnings were increased due to the cost of living increases. The first step in adjusting the Claimant's post-injury earnings is to determine the cost-of-living percentage increase over the Claimant's pre-injury rate. Once that percentage is determined, the percentage can be applied to all his post-injury earnings, regardless of how much the hourly rate was, to factor out the rate of inflation. We need only the base hourly rate of \$16.40 to determine the percentage cost-of-living increase. Thus, the Claimant's proposal to use his straight hourly rate of \$16.40 to determine the percentage increase is the correct one.

Determining the Reduction Factor to Apply to the Claimant's Post-Injury Earnings

The Claimant's base hourly wage rate increased each year in October, HT³ at 52,72, based on a cost of living percentage that is not in the record. The Employer's payroll records, Employer's Exhibits 12 and 13, show the Claimant's new base hourly rate after each cost of living increase every October. The Claimant's hourly pay rate changed on the following dates⁴ as follows:

October 9, 1995	\$16.40	
October 7, 1996	\$16.80	
October 6, 1997	\$17.20	
October 12, 1998	\$17.70 ⁵	
October 4, 1999	\$18.20	
November 15, 1999	\$19.20	(Due to promotion to foreman)

³ References to HT are to the Hearing Transcript from the trial before Judge Lindeman.

⁴ The effective dates of these hourly rate changes differ from those presented in the Claimant's Memorandum Re: Issues on Remand.

⁵ The Claimant actually received no hourly wages for the work weeks that started October 12, and 19, 1998. He was paid at a rate of \$17.20 for the work week ending October 5, 1998. Employer's Exhibit 13, p. 37. Since his pay increases occurred in October, and the next hourly rate that appeared in the Claimant's payroll record was a rate of \$17.70 for the work week starting October 26, it is reasonable to assume that his hourly rate increased around October 12, 1998.

Once the cost-of-living percentage over \$16.40⁶ is calculated for each year, we can calculate the “reduction factor”⁷ to apply to the post-injury-earnings to take out the cost-of-living percentage. For example, the Claimant’s cost-of-living increase in October 1996 was 2.4%. If we reduce his earnings after October 7, 1996, to 97.6% of the 1997 earnings, we effectively reduce the 1997 earnings to the 1996 pre-injury level.

Since the cost of living increase is applied uniformly across all hourly wage rates, multiplying the Claimant’s gross post-injury earnings by the appropriate reduction factor for each year will reduce his post-injury earnings to the pre-injury level without having to distinguish whether the earnings were the result of a shift differential or overtime. The adjusted earnings will still incorporate the higher hourly rates due to shift differentials and overtime and just reduce them to the pre-injury rate.

Applying this methodology to the hourly rates after each cost-of-living increase to determine the reduction factor needed to factor out the cost-of-living increases, yields the following results:

Date of Increase	Hourly rate after increase	Amount of increase over \$16.40	% increase over \$16.40	“Reduction Factor” to reduce wages to 1996 level
10-9-95	\$16.40	0	0%	1.00
10-7-96	\$16.80	\$.40	2.4%	.976
10-6-97	\$17.20	\$.80	4.7%	.953
10-12-98	\$17.70	\$1.30	7.3%	.927
10-4-99	\$18.20	\$1.80	9.9%	.901
11-15-99	\$19.20	\$1.45 ⁸	7.5% ⁹	.925

⁶ We calculate the cost-of-living percentage by dividing the difference between the new hourly rate and \$16.40 by the new rate. For example, using the 1997 base rate of \$16.80: $(\$16.80 - \$16.40) / \$16.80 = .024$. Thus, \$16.80 represented a 2.4% increase over the \$16.40 base rate.

⁷ The reduction factor is computed by subtracting the cost-of-living increase percentage from 100%. For 1997, the reduction factor would be 97.6%.

⁸ This is the increase over the 1996 \$17.75 hourly rate paid to foremen.

⁹ The Claimant included similar calculations in his Memorandum re: Issues on Remand with the same percentage increases, except for the November 15, 1999, increase. His result of 8.5% is incorrect.

Attached to this decision as Appendix A is a spreadsheet that identifies the Claimant's wages during his periods of temporary partial disability, with the cost of living factored out using the reduction factors above. These calculations were done on a weekly basis because the Claimant was paid on a weekly basis. This same spreadsheet shows the difference between the Claimant's adjusted earnings and his average weekly wage. The Claimant's earnings and average weekly wage figures were prorated for those weeks when he was on temporary partial disability for less than a week.

Calculation of the Revised Temporary Partial Disability Benefits

The parties also disagree about how the Claimant's wage earning capacity, and temporary partial disability benefits, should be computed. The Claimant, relying on language in Judge Lindeman's Decision on Claimant's Motion for Reconsideration, that "... payments of temporary partial disability compensation shall be paid on a weekly basis...", Reconsideration Decision¹⁰ at 2, argues that the benefits should be computed on a weekly basis so that benefits are awarded for those weeks during which the Claimant's adjusted earnings are less than his average weekly wage, but he receives no benefits for those weeks where the adjusted post-injury earnings exceed the Claimant's average weekly wage.

The Employer, on the other hand, argues that the temporary partial disability benefits should be computed for each period of temporary partial disability as a whole, so that adjusted post-injury earnings that exceed the average weekly wage are offset against earnings for those weeks in the same temporary disability period where the Claimant did not exceed his average weekly wage. The Employer advocates totaling the earnings for the entire partial disability period and comparing those earnings to the earnings that would have been paid during the same partial disability period using the average weekly wage. The difference in the two approaches is significant because under the Employer's approach the Claimant's earnings used to calculate his partial disability benefits will be reduced by the amount that his actual earnings exceed his average weekly wage during each temporary partial disability period. Neither party, however, cited any authority in support of their methodology.

After reading Judge Lindeman's initial decision, the motion for reconsideration, and Judge Lindeman's decision on the motion for reconsideration, I have concluded that the Claimant has misinterpreted Judge Lindeman's decision. Judge Lindeman's statement was made in the context of a discussion about whether the Claimant's periods of disability should include benefits for weekend days. In his initial decision, Judge Lindeman, in addition to identifying the dates of the periods of temporary partial disability, also specifically said that the Claimant was entitled to recover benefits for 466 days. (Initial Decision at 8.) This 466 figure apparently did not include weekend days, and the Claimant wanted to receive disability benefits for weekends during his light duty periods based on a claim he had worked overtime on the weekends before his injury. Judge Lindeman rejected the Claimant's argument for inclusion of all the weekend days, finding that the record did not show that

¹⁰ References to "Reconsideration Decision" are references to Judge Lindeman's August 14, 2000, Decision on Claimant's Motion for Reconsideration.

the Claimant consistently worked overtime on the weekends before his injury. Judge Lindeman also noted that the argument was moot since the Claimant's own counsel had acknowledged that the benefits would be determined by comparing the Claimant's actual earnings with his average weekly wage on a weekly basis, as opposed to a daily calculation. (Reconsideration Decision at 2.) Judge Lindeman's statement about payment of benefits on a weekly basis was in the context of this discussion about whether or not the Claimant should receive benefits for weekend days. In view of the context in which the statement was made, I conclude that Judge Lindeman's reference to benefits being paid on a weekly basis was merely a reference to how the benefits would be computed, not how they would be paid.

Temporary partial disability benefits are intended to compensate an injured worker for his reduced wage-earning capacity while he is partially disabled. The benefits are calculated as 2/3 of the difference between the injured workers' actual earnings while temporarily partially disabled and his average weekly wage for that period. (33 U.S.C. § 8(e).) Making the calculation with the earnings for the entire temporary partial disability period will more accurately determine whether the injured worker actually suffered a loss in wage earning capacity during the temporary partial disability period. The Claimant's suggestion to make the determination on a weekly basis by comparing each week's average weekly wage with the adjusted earnings and only awarding disability benefits during those weeks where he suffered a loss in his wage earning capacity could result in a windfall to the Claimant because it artificially inflates the loss in his wage earning capacity by not including the wages for the weeks where he exceeded his average weekly wage.

The two competing methodologies can be best understood with a simple example. If an injured worker is temporarily disabled for 4 weeks, and his actual wages were below his average weekly wage by \$300 for two of the weeks, but his actual wages during the other two weeks exceeded his average weekly wage by \$300 two of the weeks, under the Employer's methodology, the injured worker would have suffered no net loss in his wage earning capacity and would not be entitled to any benefits for his temporary partial disability period. Under the Claimant's methodology, he would be entitled to benefits for the two weeks where he earned less than his average weekly wage, but not for the other two weeks, and he would receive temporary disability benefits of \$400. During this 4-week temporary partial disability period taken as a whole, the hypothetical injured worker really did not suffer a loss in his wage earning capacity when his actual earnings during the partial disability period are compared to his average weekly wage. Since the purpose of temporary partial disability benefits is to compensate an injured worker for his loss in wage earning capacity, I have concluded that the Employer's methodology of aggregating all the adjusted earnings in each temporary partial disability period and comparing those adjusted earnings against the projected earnings based on the average weekly wage for the same length of time is the correct one.

After calculating the Claimant's temporary partial disability benefits by aggregating his adjusted gross earnings within each temporary partial disability period and comparing them against his projected gross earnings using his average weekly earnings, I determined that the Claimant should have received \$12,816.48 in temporary partial disability benefits during the 16 periods of temporary

partial disability. His benefits, broken down by each temporary partial disability period, are as follows:

Temporary Partial Disability Period No.	Temporary Partial Disability Dates	Unadjusted earnings during TPD	Adjusted earnings during TPD	Projected AWW during TPD	Diff. bet. AWW and adjusted earnings	Partial Disability Benefits
1	4/9/96-5/22/96	\$3,879.77	\$3,879.77	\$5,632.82	\$1,753.05	\$1,168.70
2	6/12/96-8/2/96	\$4,701.14	\$4,588.32	\$6,656.97	\$2,068.65	\$1,379.10
3	9/5/97-1/25/98	\$15,164.55	\$14,381.19	\$18,306.66	\$3,925.47	\$2,616.98
4	1/28/98-2/3/98	\$511.9	\$487.06	\$896.13	\$409.07	\$272.71
5	2/6/98-2/16/98	\$896.86	\$854.70	\$1,408.20	\$553.50	\$369.00
6	2/19/98-3/15/98	\$2,746.47	\$2,617.39	\$3,200.46	\$583.08	\$388.72
7	3/18/98-4/16/98	\$3,008.40	\$2,867.01	\$3,840.56	\$973.55	\$649.03
8	4/19/98-4/27/98	\$827.81	\$788.90	\$1,152.17	\$363.26	\$242.18
9	4/30/98-6/3/98	\$3,095.02	\$2,949.55	\$4,480.65	\$1,531.10	\$1,1020.73
10	6/6/98-6/15/98	\$904.23	\$861.73	\$1,280.19	\$418.46	\$278.97
11	6/17, 18, 20, 21/98	\$235.89	\$224.80	\$512.07	\$287.28	\$191.52
12	6/23/98-9/23/98	\$9,022.63	\$8,598.57	\$11,905.73	\$3,307.16	\$2,204.77
13	9/26/98-10/7/98	\$943.54	\$899.20	\$1,536.22	\$637.03	\$424.68

14	10/27/98- 11/2/98	\$749.72	\$694.99	\$896.13	\$201.14	\$134.09
15	5/25/9- 8/3/99	\$7344.98	\$6,808.80	\$9,089.32	\$2,280.50	\$1,520.35
16	9/8/99- 1/4/00	\$13,480.97	\$12,394.77	\$12,673.84	\$279.07	\$186.05

The parties agree that the Employer paid the Claimant \$10,743.36 in temporary disability benefits. (Gunderson Marine, Inc's Memorandum re; Issues on Remand at 1; Claimant's Memorandum re: Issues on Remand at 4.) The difference between the new benefits amount and the benefits already paid is \$2,073.12. Thus, the Claimant is entitled to an additional \$2,073.12 in temporary partial disability benefits.

Claimant's Permanent Partial Disability Award

The Claimant argued before Judge Lindeman that he should receive permanent partial disability benefits because he was not able to work as much overtime after his injury as he had worked before his injury. He testified that he turned down two days of overtime and that he took a day of vacation because of problems with his injury. Judge Lindeman was not persuaded by the Claimant's testimony and awarded only nominal benefits, finding that the Claimant's testimony about the lack of overtime was "somewhat clear and inconsistent." (Initial Decision at 10.) Judge Lindeman concluded that the Claimant had not suffered a loss in his wage earning capacity after reaching MMI but was entitled to a nominal award of permanent partial disability benefits because it had only been two months since the Claimant reached maximum medical improvement, his current employment with the Employer was not guaranteed, he was not a member of a union, and he had a limited education.

On appeal, the BRB found that there was evidence that the Claimant was unable to work as many overtime hours after his injury due to his work-related injury because the Claimant had testified that the same amount of overtime work was available after his injury, but he was unable to perform as many days of overtime because of his injury. (BRB Decision and Order at 5.) The BRB remanded this case with instructions to give further consideration to the issue of whether the Claimant has a reduction in his current wage earning capacity due to a loss of overtime and his claim that he has been unable to work as many overtime hours because of his work-related injury. The crux of the determination required by the remand is whether the Complainant's injury impacted his ability to work overtime after he reached maximum medical improvement.

Under the Employer's policy, employees on light duty were ineligible to work voluntary overtime, TR at 73, though the Claimant did work some overtime occasionally while he was on light

duty.¹¹ In the 52 weeks before his injury, from March 27, 1995, to March 24, 1996, the Claimant worked 430.2 hours of overtime, averaging 8.27 hours of overtime per week. (Employer's Exhibit 12, pp. 13-19.)

Though the Judge Lindeman found that the Claimant did not reach MMI until January 4, 2000, his doctor released him for unrestricted duty on September 22, 1999, making him eligible to work overtime beginning September 22, 1999. Between September 27, 1999, and January 2, 2000, the day the Claimant reached MMI, worked 101 hours of overtime, averaging 6.73 hours per week.

The Claimant was promoted to foreman on November 15, 1999. The same amount of overtime was available to the Claimant before and after his promotion. (TR at 51.) With the exception of the two days of overtime that he turned down in February 2000, and one vacation day that he took off to rest his back, the Claimant was at work every day after becoming foreman and he worked overtime as a foreman almost every week. (TR at 61, 64.) Specifically, from November 15, 1999, when he was promoted, until February 27, 2000, the Claimant worked an average of 10.23 hours of overtime per week despite the fact that he turned down two days of overtime. (Employer's Exhibit 13, pp. 45-45B.) Focusing on the overtime worked after the Claimant reached MMI, in the 8 weeks between January 3 and February 27, 2000, the Claimant worked an average of 12.99 hours of overtime. (Employer's Exhibit 13, pp. 45A-B.)

The Claimant agreed with the Employer's estimate at the hearing that he had worked an average of 10 hours of overtime per week after becoming a foreman, TR at 59, 67, but testified that he would have worked more hours of overtime if he had not suffered his injury. He estimated that before his injury, he would work an average of 16 hours of overtime on the weekends as a leadman during a four-month period. (TR at 67.)

After carefully analyzing the payroll records and the Claimant's testimony, I am not persuaded that the Claimant has a current loss in his wage earning capacity due to an inability to work as much overtime as he did before his injury. The documentary evidence, specifically, the payroll records, do not support the Claimant's claim that he has been unable to work as much overtime after reaching MMI as he worked before his injury. A detailed analysis of the Claimant's payroll records, Employers' Exhibits 12 and 13, show the following overtime work averages which were discussed earlier:

¹¹ For instance, the Claimant worked 8 hours of overtime during the pay period ending November 9, 1997, while he was on light duty. This may have been mandatory overtime. (TR at 49.)

Time Period	Dates	Total OT worked	# of Pay Periods	Average OT/wk
Before injury	3/27/95 - 3/24/96	430.2 hours	52 weeks	8.27 OT hours/week
After reaching MMI	1/3/00 - 2/27/00 ¹²	103.9 hours	8 weeks	12.99 OT hours/week
After promotion to foreman	11/15/99 - 2/27/00	153.4 hours	15 weeks	10.23 OT hours/week
Between promotion and reaching MMI	11/15/99 - 1/2/00	49.5 hours	7 weeks	7.07 OT hours/week
Between return to full duty and reaching MMI	9/27/99 - 1/2/00	101 hours	15 weeks	6.73 OT hours/week

As the table shows, after reaching MMI, until he was disqualified from working overtime for reasons unrelated to his injury, the Claimant averaged 12.99 hours of overtime, one and a half times more overtime than he did before his injury, even though he turned down 16 hours of overtime. Even before the Claimant reached MMI, he worked more overtime than before his injury if we consider the time period starting with when he became a foreman.

However, the Claimant's entitlement to permanent partial disability benefits begins after he reached MMI. Since analysis of the Claimant's overtime work history shows that he worked one and a half times more overtime after reaching MMI than he worked as a leadman before his injury, I find he has not shown a loss in his wage earning capacity due to an inability to work as much overtime after reaching MMI.

The Claimant testified anecdotally that before he was injured, during a 4 month period, he would work an average of 16 overtime hours each week. (TR at 67.) Coupled with his testimony that he turned down 16 hours of overtime in February 2000 after reaching MMI, he appears to have suffered a loss in his current wage earning capacity due to an inability to work as much overtime. In this remand proceeding, he asked that he be awarded permanent partial disability benefits that includes 16 hours per week of overtime pay that he claims he would have worked if he had not been injured. (Claimant's Memorandum re: Issues on Remand at 11.)

¹²

The payroll records end with the pay period ending February 27, 2000.

However, looking past his anecdotal testimony to the actual overtime payroll records, the Claimant did not routinely work an average of 16 hours of overtime. As just discussed, his average overtime during the year before his injury was only 8.27 hours per week, almost half the 16 hours of overtime he said he worked. He did say that the 16 hours of overtime was over a four-month period, and the payroll records show that in the four months between April 23, 1995, and August 27, 1995, he worked a total of 339.5 hours of overtime, averaging 17.87 hours of overtime a week. However, those same payroll records show that during the four-month period immediately after that, for the pay periods from September 3, 1995, through January 7, 1996, the Claimant worked a total of only 24.5 hours of overtime, averaging 1.36 hours of overtime per week.

The payroll records clearly show that the Claimant has worked more overtime hours per week since reaching MMI than he ever worked before his injury, with the exception of the four-month period between April 23 and August 27, 1995. As a matter of fact, in the 52 weeks before his injury, there were 25 weeks where the Claimant worked no overtime.¹³ The record shows that the Claimant has worked overtime more consistently since reaching MMI than before his injury. The Claimant worked overtime during every single pay period in the 8 pay periods between when he reached MMI and February 27, 2000. (Employer's Exhibit 13, pp. 45A-B.) Thus, I conclude that the Claimant has suffered no loss in his current wage earning capacity due to a loss of overtime work, and I affirm Judge Lindeman's award of nominal permanent disability benefits.

The Claimant's Attorney Fees

In a Supplemental Decision and Order Awarding Attorney Fees issued September 25, 2000, Judge Lindeman awarded the Claimant's counsel \$8,000 in attorney fees for services rendered through August 13, 2000, an additional \$1,100 for preparation of the Claimant's reply to the Employer's objections, and costs of \$78.93. Both the Claimant and the Employer appealed Judge Lindeman's attorney fee award. The BRB initially vacated Judge Lindeman's award and remanded it for further action. (BRB Decision and Order at 8.) However, in an Order on Motion for Reconsideration filed May 29, 2002, the BRB reversed its earlier decision vacating Judge Lindeman's attorney fee award and affirmed his award with some slight modifications. (BRB Order on Motion for Reconsideration at 5-6.) The BRB, however, noted that the ALJ could consider an increased fee on remand if the Claimant obtained additional benefits in the remand proceeding.

In his Memorandum re: Issues on Remand, the Claimant argued that he should be awarded an enhanced fee because of the delay in payment of the fees that were awarded to him. (Claimant's Memorandum re: Issues on Remand at 12). The Employer argued that the Claimant is not entitled

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The Claimant worked no overtime during the pay periods ending April 2, April 9, April 16, May 14, June 18, July 30, August 6, September 3, September 10, September 17, September 24, October 1, October 8, October 22, October 29, November 5, November 12, November 19, November 26, December 10, December 17, 1995; January 7, January 14, January 28, and February 1, 1996.

to an increased fee on remand and that the Claimant's motion for an enhanced fee is premature. (Gunderson Marine, Inc's Memorandum re: Issues on Remand at 24.) In reply, the Claimant acknowledged that the request for an enhanced fee was premature and asked that I defer the issue of additional fees until after the order on remand was filed.

The Claimant's request is GRANTED. The issue of whether the Claimant's counsel should receive an increased fee as a result of this decision and order will be deferred until after the parties have had an opportunity to address this issue in the context of a specific request for additional fees.

Applicable Interest Rate

The parties disagree on the date to be used to determine the rate of interest for the partial disability benefits owed to the Claimant. The Claimant argues that either July 14, 2000, the date of Judge Lindeman's initial Decision and Order Awarding Benefits was filed by the District Director, or September 25, 2000, the date of Judge Lindeman's Decision on Claimant's Motion for Reconsideration was filed, should be used. The Employer, on the other hand, citing *Kaiser Aluminum & Chemical Co. v. Bonjorno*, 494 U.S. 827, 835-36 (1990), argues that interest should run from "the date of entry of the judgment that correctly ascertains damages."

The Claimant cites the Benefits Review Board's decision in *Grant v. Portland Stevedoring Company*, 17 BRBS 20 (1985), in support of his argument. The Benefits Review Board in *Grant* did hold that the date the ALJ's decision and order was filed by the District Director should control the choice of the interest rate to be applied to disability compensation awards under the Act. However, the BRB also explained in footnote 5 of its decision that it selected that date because the date the ALJ's decision was filed by the District Director was the date a compensation order became effective. *Id.* at 23.

The additional compensation ordered in this remand decision and order will not be effective until this decision is filed by the District Director. Applying the BRB's rationale to this case, the applicable interest rate for the additional benefits due the Claimant should be the interest rate on the date this decision and order filed by the District Director, not the dates of Judge Lindeman's Decision and Order Awarding Benefits or his Decision on Claimant's Motion for Reconsideration.

Thus, I conclude that the applicable interest rate for the additional disability benefits owed to the Claimant is the date that this decision and order is filed by the District Director.

ORDER

It is therefore ordered that:

1. The Employer/Carrier shall pay to the Claimant an additional \$2,073.12 in temporary partial disability benefits.

2. The Employer/Carrier shall pay to the Claimant compensation in the amount of \$1 per week for his permanent partial disability beginning January 5, 2000.
3. The interest rate applied to these additional benefits shall be the rate in effect on the date this decision and order is filed by the District Director.
4. The Claimant's counsel shall file his request for any additional fees 20 days after the date this decision and order is filed by the District Director.

A

JENNIFER GEE
Administrative Law Judge

Wade Fish v. Gunderson Marine
Calculation of Temporary Partial Disability Benefits

Temporary Disability Period Number	TPD Dates	Week ending	# Days on TPD	Total earnings during pay period (R's Exhibit 13)	Unadjusted gross earnings while on TPD	COL Adjustment Factor	TPD earnings adjusted for COL	AWW	AWW for TPD period	Difference between AWW and earnings	2/3 Difference between AWW and adjusted earnings
1	4/9-5/22/96	4/14/96	6	\$336.20	\$288.17	1.000	\$288.17	\$896.13	\$768.11	\$479.94	\$319.96
		4/21/96	7	\$656.00	\$656.00	1.000	\$656.00		\$896.13	\$240.13	\$160.09
		4/28/96	7	\$656.00	\$656.00	1.000	\$656.00		\$896.13	\$240.13	\$160.09
		5/5/96	7	\$623.20	\$623.20	1.000	\$623.20		\$896.13	\$272.93	\$181.95
		5/12/96	7	\$918.40	\$918.40	1.000	\$918.40		\$896.13	\$-22.27	\$-14.85
		5/19/96	7	\$393.60	\$393.60	1.000	\$393.60		\$896.13	\$502.53	\$335.02
		5/26/96	3	\$803.60	\$344.40	1.000	\$344.40		\$384.06	\$39.66	\$26.44
	Totals			\$4,387.00	\$3,223.77		\$3,591.60		\$5,632.82	\$1,273.11	\$848.74
2	6/12-8/2/96	6/16/96	5	\$492.00	\$351.43	0.976	\$342.99		\$640.09	\$297.10	\$198.07
		6/23/96	7	\$1,156.20	\$1,156.20	0.976	\$1,128.45		\$896.13	\$-232.32	\$-154.88
		6/30/96	7	\$656.00	\$656.00	0.976	\$640.26		\$896.13	\$255.87	\$170.58
		7/7/96	7	\$0.00	\$0.00	0.976	\$0.00		\$896.13	\$896.13	\$597.42
		7/14/96	7	\$656.00	\$656.00	0.976	\$640.26		\$896.13	\$255.87	\$170.58
		7/21/96	7	\$660.30	\$660.30	0.976	\$644.45		\$896.13	\$251.68	\$167.78
		7/28/96	7	\$656.00	\$656.00	0.976	\$640.26		\$896.13	\$255.87	\$170.58
		8/4/96	5	\$791.30	\$565.21	0.976	\$551.65		\$640.09	\$88.44	\$58.96
	Totals			\$5,067.80	\$4,349.71		\$4,245.32		\$6,656.97	\$1,771.55	\$1,181.03
3	9/5/97-1/25/98	9/7/97	3	\$132.00	\$56.57	0.927	\$52.44		\$384.06	\$331.61	\$221.08
		9/14/97	7	\$680.00	\$680.00	0.927	\$630.36		\$896.13	\$265.77	\$177.18
		9/21/97	7	\$660.00	\$660.00	0.927	\$611.82		\$896.13	\$284.31	\$189.54
		9/28/97	7	\$660.00	\$660.00	0.927	\$611.82		\$896.13	\$284.31	\$189.54
		10/5/97	7	\$660.00	\$660.00	0.927	\$611.82		\$896.13	\$284.31	\$189.54
		10/12/97	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31

Wade Fish v. Gunderson Marine
Calculation of Temporary Partial Disability Benefits

Temporary Disability Period Number	TPD Dates	Week ending	# Days on TPD	Total earnings during pay period (R's Exhibit 13)	Unadjusted gross earnings while on TPD	COL Adjustment Factor	TPD earnings adjusted for COL	AWW	AWW for TPD period	Difference between AWW and earnings	2/3 Difference between AWW and adjusted earnings
		10/19/97	7	\$807.88	\$807.88	0.953	\$769.91		\$896.13	\$126.22	\$84.15
		10/26/97	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		11/2/97	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		11/9/97	7	\$1,393.20	\$1,393.20	0.953	\$1,327.72		\$896.13	\$-431.59	\$-287.73
		11/16/97	7	\$275.20	\$275.20	0.953	\$262.27		\$896.13	\$633.86	\$422.58
		11/23/97	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		11/30/97	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		12/7/97	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		12/14/97	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		12/21/97	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		12/28/97	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		1/4/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		1/11/98	7	\$1,100.80	\$1,100.80	0.953	\$1,049.06		\$896.13	\$-152.93	\$-101.95
		1/18/98	7	\$1,290.00	\$1,290.00	0.953	\$1,229.37		\$896.13	\$-333.24	\$-222.16
		1/25/98	7	\$700.90	\$700.90	0.953	\$667.96		\$896.13	\$228.17	\$152.11
	Totals			\$15,239.98	\$15,107.98		\$14,328.74		\$18,306.66	\$3,593.86	\$2,395.90
4	1/28-2/3/98	2/1/98	5	\$550.40	\$393.14	0.953	\$374.67		\$640.09	\$265.43	\$176.95
		2/8/98	2	\$412.80	\$117.94	0.953	\$112.40		\$256.04	\$143.64	\$95.76
		Totals		\$963.20	\$511.09		\$487.06		\$896.13	\$409.07	\$272.71
5	2/6-2/16/98	2/8/98	3	\$412.80	\$176.91	0.953	\$168.60		\$384.06	\$215.46	\$143.64
		2/15/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		2/22/98	1	\$223.60	\$31.94	0.953	\$30.44		\$128.02	\$97.58	\$65.05
	Totals			\$1,324.40	\$896.86		\$854.70		\$1,408.20	\$553.50	\$369.00

Wade Fish v. Gunderson Marine
Calculation of Temporary Partial Disability Benefits

Temporary Disability Period Number	TPD Dates	Week ending	# Days on TPD	Total earnings during pay period (R's Exhibit 13)	Unadjusted gross earnings while on TPD	COL Adjustment Factor	TPD earnings adjusted for COL	AWW	AWW for TPD period	Difference between AWW and earnings	2/3 Difference between AWW and adjusted earnings
6	2/19-3/15/98	2/22/98	4	\$223.60	\$127.77	0.953	\$121.77		\$512.07	\$390.31	\$260.21
		3/1/98	7	\$1,204.00	\$1,204.00	0.953	\$1,147.41		\$896.13	\$-251.28	\$-167.52
		3/8/98	7	\$726.70	\$726.70	0.953	\$692.55		\$896.13	\$203.58	\$135.72
		3/15/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
	Totals			\$2,842.30	\$2,746.47		\$2,617.39		\$3,200.46	\$583.08	\$388.72
7	3/18-4/16/98	3/22/98	5	\$688.00	\$491.43	0.953	\$468.33		\$640.09	\$171.76	\$114.51
		3/29/98	7	\$550.40	\$550.40	0.953	\$524.53		\$896.13	\$371.60	\$247.73
		4/5/98	7	\$964.06	\$964.06	0.953	\$918.75		\$896.13	\$-22.62	\$-15.08
		4/12/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
	Totals	4/19/98	4	\$550.40	\$314.51	0.953	\$299.73		\$512.07	\$212.34	\$141.56
8				\$3,440.86	\$3,008.40		\$2,867.01		\$3,840.56	\$973.55	\$649.03
	4/19-4/27/98	4/19/98	1	\$550.40	\$78.63	0.953	\$74.93		\$128.02	\$53.09	\$35.39
		4/26/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		5/3/98	1	\$428.28	\$61.18	0.953	\$58.31		\$128.02	\$69.71	\$46.47
	Totals			\$1,666.68	\$827.81		\$788.90		\$1,152.17	\$363.26	\$242.18
9	4/30-6/3/98	5/3/98	4	\$428.28	\$244.73	0.953	\$233.23		\$512.07	\$278.85	\$185.90
		5/10/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		5/17/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		5/24/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		5/31/98	7	\$550.40	\$550.40	0.953	\$524.53		\$896.13	\$371.60	\$247.73
		6/7/98	3	\$550.40	\$235.89	0.953	\$224.80		\$384.06	\$159.26	\$106.17

Wade Fish v. Gunderson Marine
Calculation of Temporary Partial Disability Benefits

Temporary Disability Period Number	TPD Dates	Week ending	# Days on TPD	Total earnings during pay period (R's Exhibit 13)	Unadjusted gross earnings while on TPD	COL Adjustment Factor	TPD earnings adjusted for COL	AWW	AWW for TPD period	Difference between AWW and earnings	2/3 Difference between AWW and adjusted earnings
	Totals			\$3,593.08	\$2,850.29		\$2,716.32		\$4,480.65	\$1,252.25	\$834.84
10	6/6-6/15/98	6/7/98	2	\$550.40	\$157.26	0.953	\$149.87		\$256.04	\$106.17	\$70.78
		6/14/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		6/21/98	1	\$412.80	\$58.97	0.953	\$56.20		\$128.02	\$71.82	\$47.88
	Totals			\$1,651.20	\$904.23		\$861.73		\$1,280.19	\$418.46	\$278.97
11	6/17,18,20,21/98	6/21/98	4	\$412.80	\$235.89	0.953	\$224.80		\$512.07	\$287.28	\$191.52
	Totals			\$412.80	\$235.89		\$224.80		\$512.07	\$287.28	\$191.52
12	6/23-9/23/98	6/28/98	6	\$550.40	\$471.77	0.953	\$449.60		\$768.11	\$318.51	\$212.34
		7/5/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		7/12/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		7/29/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		7/26/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		8/2/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		8/9/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		8/16/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		8/23/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		8/30/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		9/6/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		9/13/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		9/20/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		9/21/98	3	\$688.00	\$294.86	0.953	\$281.00		\$384.06	\$103.06	\$68.70
	Totals			\$9,494.40	\$8,550.86		\$8,148.97		\$11,905.73	\$2,988.65	\$1,992.43

Wade Fish v. Gunderson Marine
Calculation of Temporary Partial Disability Benefits

Temporary Disability Period Number	TPD Dates	Week ending	# Days on TPD	Total earnings during pay period (R's Exhibit 13)	Unadjusted gross earnings while on TPD	COL Adjustment Factor	TPD earnings adjusted for COL	AWW	AWW for TPD period	Difference between AWW and earnings	2/3 Difference between AWW and adjusted earnings
13	9/26-10/7/98	9/27/98	2	\$688.00	\$196.57	0.953	\$187.33		\$256.04	\$68.70	\$45.80
		10/4/98	7	\$688.00	\$688.00	0.953	\$655.66		\$896.13	\$240.47	\$160.31
		10/11/98	3	\$137.60	\$58.97	0.953	\$56.20		\$384.06	\$327.86	\$218.57
	Totals			\$1,513.60	\$943.54		\$899.20		\$1,536.22	\$637.03	\$424.68
14	10/27-11/2/98	11/1/98	6	\$708.00	\$606.86	0.927	\$562.56		\$768.11	\$205.55	\$137.04
		11/8/98	1	\$1,000.05	\$142.86	0.927	\$132.44		\$128.02	\$-4.42	\$-2.94
	Totals			\$1,708.05	\$749.72		\$694.99		\$896.13	\$201.14	\$134.09
15	5/25-8/3/99	5/30/99	6	\$832.25	\$713.36	0.927	\$661.28		\$768.11	\$106.83	\$71.22
		6/6/99	7	\$850.30	\$850.30	0.927	\$788.23		\$896.13	\$107.90	\$71.93
		6/13/99	7	\$725.70	\$725.70	0.927	\$672.72		\$896.13	\$223.41	\$148.94
		6/20/99	7	\$849.60	\$849.60	0.927	\$787.58		\$896.13	\$108.55	\$72.37
		6/27/99	7	\$672.60	\$672.60	0.927	\$623.50		\$896.13	\$272.63	\$181.75
		7/4/99	7	\$584.10	\$584.10	0.927	\$541.46		\$896.13	\$354.67	\$236.45
		7/11/99	7	\$708.00	\$708.00	0.927	\$656.32		\$896.13	\$239.81	\$159.88
		7/18/99	7	\$725.70	\$725.70	0.927	\$672.72		\$896.13	\$223.41	\$148.94
		7/25/99	7	\$628.35	\$628.35	0.927	\$582.48		\$896.13	\$313.65	\$209.10
		8/1/99	7	\$684.99	\$684.99	0.927	\$634.99		\$896.13	\$261.14	\$174.10
		8/8/99	2	\$708.00	\$202.29	0.927	\$187.52		\$256.04	\$68.52	\$45.68
	Totals			\$7,969.59	\$6,631.63		\$6,147.52		\$9,089.32	\$2,173.69	\$1,449.13
16	9/28/99-1/4/00	10/3/99	6	\$1,000.05	\$857.19	0.927	\$794.61		\$768.11	\$-26.50	\$-17.67
		10/10/99	7	\$1,001.00	\$1,001.00	0.911	\$911.91		\$896.13	\$-15.78	\$-10.52

Wade Fish v. Gunderson Marine
Calculation of Temporary Partial Disability Benefits

Temporary Disability Period Number	TPD Dates	Week ending	# Days on TPD	Total earnings during pay period (R's Exhibit 13)	Unadjusted gross earnings while on TPD	COL Adjustment Factor	TPD earnings adjusted for COL	AWW	AWW for TPD period	Difference between AWW and earnings	2/3 Difference between AWW and adjusted earnings
		10/17/99	7	\$1,008.81	\$1,008.81	0.911	\$919.03		\$896.13	\$-22.90	\$-15.26
		10/24/99	7	\$1,295.84	\$1,295.84	0.911	\$1,180.51		\$896.13	\$-284.38	\$-189.59
		10/31/99	7	\$718.90	\$718.90	0.911	\$654.92		\$896.13	\$241.21	\$160.81
		11/7/99	7	\$736.00	\$736.00	0.911	\$670.50		\$896.13	\$225.63	\$150.42
		11/14/99	7	\$728.00	\$728.00	0.911	\$663.21		\$896.13	\$232.92	\$155.28
		11/21/99	7	\$854.50	\$854.50	0.925	\$790.41		\$896.13	\$105.72	\$70.48
		11/28/99	7	\$768.00	\$768.00	0.925	\$710.40		\$896.13	\$185.73	\$123.82
		12/5/99	7	\$1,315.20	\$1,315.20	0.925	\$1,216.56		\$896.13	\$-320.43	\$-213.62
		12/12/99	7	\$1,099.20	\$1,099.20	0.925	\$1,016.76		\$896.13	\$-120.63	\$-80.42
		12/19/99	7	\$1,228.80	\$1,228.80	0.925	\$1,136.64		\$896.13	\$-240.51	\$-160.34
		12/26/99	7	\$768.00	\$768.00	0.925	\$710.40		\$896.13	\$185.73	\$123.82
		1/2/00	7	\$768.00	\$768.00	0.925	\$710.40		\$896.13	\$185.73	\$123.82
		1/4/00	2	\$1,167.36	\$333.53	0.925	\$308.52		\$256.04	\$-52.48	\$-34.99
	Totals			\$14,457.66	\$12,623.78		\$11,600.16		\$12,673.84	\$305.57	\$203.71